

### REMARKS/ARGUMENTS

Claims 1, 5, 8, 11-22, and 36 are pending in this application. Claims 1, 5, 8, 11-22, and 36 stand rejected. The issue raised in the final Office Action (Current Action) of July 23, 2010 is as follows:

- \* Claims 1, 5, 8, 11-22, and 36 are rejected under 35 U.S.C. § 103(a) as being unpatentable.

In response, Applicant respectfully traverses the outstanding claim rejection and requests reconsideration and withdrawal in light of the amendment to the claims and remarks presented herein.

### ***REJECTIONS UNDER 35 U.S.C. § 103***

***Claims 1, 5, 8, 11-22, and 36 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Fleischner, and Brand and further in view of Cho et al.***

Claims 1, 5, 8, 11-22, and 36 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,291,533 to Fleischner (hereinafter Fleischner) in view of *An Outstanding Food Source of Vitamin C, The Lancet*, Vol. 320, Issue 833, p. 873 to Brand et al. (hereinafter Brand) and further in view of U.S. Patent Application Publication No. 2002/0192314 to Cho et al. (hereinafter Cho).

The combination of Fleischner and Brand and Cho simply fails to teach each and every limitation listed in the claims because they fail to predict the synergistic effect found with the present invention. Applicants fail to understand how the Office can continue to state that, "it is within the knowledge of one with ordinary skill in the art (it would be obvious) to modify the percentage of a nutrient /& types of nutrients in an ingredient/supplement for the desired effect" (Advisory Action 10/12/2010), when, in fact, the present inventors found surprisingly and unexpectedly a synergistic effect by their combination using a heretofore unknown method for determining the combined contribution of lipophobic and lipophilic antioxidants. Specifically, the combination fails to disclose a bush plum pulp and skin comprising 5% vitamin C nor does it teach the flavonoid and mixture of vitamin E in an amount of from 30% to 85% by weight and acts

in synergy to provide a higher antioxidant and grape skin extract comprising 30-82% polyphenols.

The Current Action agrees that Fleischner does not teach bush plum pulp and skin comprising 5% vitamin C (page 3). The Current Action states that Brand does not teach a percentage of vitamin C of 5% from bush plum pulp and skin (page 3). The Current Action also states that Fleischner and Brand both fail to disclose a grape skin extract comprising 30-82% polyphenols (page 4).

First, the Current Action attempts to cure these deficiencies through an apparent attempt to officially notice the fact that it would have been obvious to use bush plum pulp and skin comprising 5% vitamin C. If the Office is not attempting to take Official Notice, then the Applicant is requesting that evidence be placed on the record or the rejection withdrawn. If the Office has intended to take Official Notice, such an attempt is traversed, at least because it is not in compliance with the Office's own procedures. Proper use of Official Notice requires compliance with several obligations expressly set forth in the *Manual of Patent Examining Procedure*. The Office has failed to meet these obligations. Specifically, the Office has failed to satisfy its obligations under MPEP § 2144.03. *MPEP § 2144.03 (B)*, for example, expressly requires the Office to provide specific factual findings predicated on sound technical and scientific reasoning to support taking Official Notice. The *MPEP* goes on to explain that this means that the Office should present an Applicant with the explicit basis on which Official Notice is based so that the Applicant is able to challenge the assertion in the next reply after the Current Action. (*MPEP §2144.03(B)*). Naked assertions about what is allegedly known in the art, like those made at pages 3-4 of the Current Action, cannot satisfy these requirements.

Second, there is nothing on the record that indicates a reason why a person of ordinary skill in the relevant field would combine the elements in the way the claimed new invention does. The simple fact that several elements were known does not provide any motivation to combine the elements as listed or claimed. The fact that as specific plum was known does not prompt the skilled artisan to combine the pulp and skin comprising 5% vitamin C with the other elements as in the claimed invention. In *KSR Int'l. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007), the Court stated that "a patent

composed of several elements **is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.** Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify **a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.** The Office Action fails to provide any reason to combine the art as suggested and provides no exaptation of success.

Also, the composition elements and specific ratios used in the instant invention were carefully determined by the Applicant and there is nothing on the record that provides any indication what would have prompted the skilled artisan to arrive at the specific percentages or ingredients other than mere trial and error of all of the numerous possible percentages and a limitless number of ingredients. In the recent decision of *In re Kubin*, 561 F.3d 1351 (Fed. Cir. 2009), the Federal Circuit explained that it is improper to build a rejection for obviousness by “merely throw[ing] metaphorical darts at a board filled with combinatorial prior art possibilities, courts should not succumb to hindsight claims of obviousness.” The Current Action does nothing more than use hindsight reconstruct to arrive at the claims of the instant invention.

The combination of Fleischner and Brand and Cho does not establish a *prima facie* case of obviousness. The combination fails to suggest to modify the reference or to combine reference teachings as proposed, fails to provide a reasonable expectation of success, and does not teach or suggest all the claim limitations. MPEP § 2143;

Accordingly, claims 1, 5, 8, 11-22 and 36 are not rendered obvious by Fleischner, Brand and Cho, or any combination thereof. Applicants respectfully request the Examiner withdraw the rejection under 35 U.S.C. § 103(a).

## CONCLUSION

In light of the remarks and arguments presented above, Applicants respectfully submit that the claims in the Application are in condition for allowance. Claims 1, 5, 8, 11-22, and 36 have been allowed. Favorable consideration and allowance of the pending claims 1, 5, 8, 11-22, and 36 are therefore respectfully requested.

In view of the above, Applicants believe the pending Application is in condition for allowance. Applicants believe this paper is being filed with all required fees. However, if any additional fee is due, including those for an extension of time please charge any fees required or credit any overpayment to Chalker Flores, LLP's Deposit Account No. 50-4863 during the pendency of this Application pursuant to 37 CFR 1.16 through 1.21 inclusive, and any other section in Title 37 of the Code of Federal Regulations that may regulate fees. If an extension of time is required with this response but is not included, Applicants hereby petition for a Request for Extension of Time under 37 CFR 1.136(a).

If the Examiner has any questions or comments, or if further clarification is required, it is requested that the Examiner contact the undersigned at the telephone number listed below.

Dated: October 25, 2010.

Respectfully submitted,  
CHALKER FLORES, LLP



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